MIDEAST OUTPOST

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MISCONCEPTIONS REGARDING ISRAEL'S LEGAL FOUNDATION UNDER INTERNATIONAL LAW:HOWARD GRIEF

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There is a widespread misconception current also among Israel's government leaders and media, that the State of Israel derives its legal existence from the United Nations General Assembly Resolution 181 (II) of November 29, 1947, popularly known as the Partition Resolution. This misconception is so ingrained in official and popular thinking that it is extremely difficult to change, regardless of the overwhelming evidence to the contrary.

One major reason for this is that Israel's own Proclamation of Independence perpetuates the wrongful notion that it was "on the strength of the Resolution of the United Nations General Assembly" that the members of "the People's Council" declared the establishment of the State of Israel on May 14, 1948. Other reasons cited in the Proclamation were "our natural and historic right." It was further stated there that "the State of Israel will cooperate with the UN in implementing the resolution of the General Assembly of the 29th November, 1947, and will take steps to bring about the economic union of the whole of Eretz-Israel."

The misstatement in the Proclamation of Independence that the State of Israel relied "on the strength" of the Partition Resolution for its legal establishment conceals or actually suppresses the fact that Israel's legal foundation under international law derives not from the 1947 Partition Resolution, which was merely a non-binding recommendation without any force of law, but rather from the San Remo Resolution of April 25, 1920. The latter did have the force of law upon its being incorporated first in the Treaty of Sèvres of August 10, 1920 and then in the first three recitals of the Preamble of the Mandate for Palestine, which was confirmed by the 52 states, all members of the League of Nations, in 1922 and separately by the United States in a 1924 treaty with the United Kingdom.

The Proclamation of Independence does make mention of the Balfour Declaration and the Mandate for Palestine in what has been characterized as its historical section, but in justifying the establishment of the Jewish State in its operative part it overlooks those two interrelated documents—except indirectly, in making use of the phrase "historic[al] right." Nor does the Proclamation even refer to the most important document which laid the legal foundation for the Jewish State—the San Remo Resolution, which transformed the Balfour Declaration of 1917 from an act of British policy to a legally recognized binding act of international law in 1920.

This indicates that even the leaders of Israel, who drafted the Proclamation of Independence—the principal authors of which were David Ben-Gurion and Moshe Sharett—were curiously unaware of the enormous significance of the San Remo Resolution, for otherwise they would undoubtedly have cited it as the true foundation document for the proclamation of the State of Israel, rather than the Partition Resolution.

Any serious analysis of these two resolutions will demonstrate that the Partition Resolution actually contradicted both the letter and the spirit of the San Remo Resolution, in that the former illegally allotted a substantial portion of Western Palestine for the establishment of an Arab state, territory which the San Remo Resolution had earmarked, on the basis of the historical/biblical formula for determining Palestine's boundaries for the Jewish National Home and the future independent Jewish State. Furthermore, under the San Remo Resolution the Arabs were generously awarded all the land they needed for their own state or states in the rest of the Middle East or Levant.

On the face of it, the Zionist acceptance of the Partition Resolution was unwise, insofar as that document denied Jewish national and political rights already recognized over that portion of the Land of Israel it would have assigned to the new Arab state. However, as a mitigating circumstance, it ought to be noted that under the conditions existing in 1948, there was an urgent need for the immediate declaration of a Jewish State in order to absorb and settle the hundreds of thousands of homeless Jewish refugees still languishing in European displaced person camps in Germany and Poland after the end of the Second World War. The Jewish Agency decision to accept the illegal Partition Resolution was thus an act of desperation taken under duress, a condition which legally invalidated its acceptance.

In any case, the Arab rejection of the Partition Resolution and the war of aggression the Arabs unleashed against the fledgling Jewish State also invalidated the Jewish acceptance, thus allowing Ben-Gurion to consider the Partition Resolution null and void as early as August 1948, when he decided to annex to the Jewish State the area of Western Jerusalem and its approaches. He then did the same for all other areas of Eretz-Israel lying beyond the UN partition lines that had already been captured by the IDF or that would shortly be captured in the War of Independence.

To implement his decision, Ben-Gurion had legislation enacted by the Provisional State Council, the purpose of which was to eventually bring all areas of the Land of Israel that had come into the possession of the IDF into the State of Israel. That clearly meant that for Ben-Gurion, i.e., for Israel, the Partition Resolution was already a dead letter by virtue of Arab rejection and war of aggression.

It was not only Israel's Proclamation of Independence that failed to mention the San Remo Resolution. That was also the case for the Partition Resolution itself and the preceding Report to the General Assembly prepared by the eleven-state United Nations Special Committee on Palestine (UNSCOP), and delivered on August 31, 1947. The UNSCOP Report, which alluded to the San Remo Resolution in discussing Palestine under the Mandate, said that "on 25 April, 1920 the Supreme Council of the Allied Powers agreed to allocate the Mandate for Palestine to Great Britain on the understanding that the Balfour Declaration would be put into effect."

This allusion did not further expound on the significance of the San Remo Resolution as the raison d'etre for a re-constituted Jewish State in Palestine under the aegis of the Mandatory Power. The lack of specific reference to the San Remo Resolution in either the Partition Resolution or the UNSCOP Report can be seen as the strongest evidence that the international community had conveniently forgotten about this fundamental document that assumed the form of an inter-Allied agreement between Britain, France, Italy and Japan and allotted an undivided Palestine to the Jewish People for its national home. Had the authors of the 1947 UN documents understood the diplomatic and legal history of Palestine as encapsulated in the San Remo Resolution, they might have hesitated in recommending that Western Palestine be partitioned into Jewish and Arab states, a recommendation that violated not only the San Remo Resolution, but also Article 5 of the Mandate for Palestine which expressly prohibited the partition of the country (then still very much in force) as well as Article 80 of the 1945 UN Charter, which preserved all Jewish national and political rights to Palestine, to the exclusion of Arab claims to the land.

Another pervasive misconception regarding the Partition Resolution is that it constituted an "order" or injunction by the UN to divide Palestine that had to be fulfilled by the respective Arab and Jewish parties. This misconception recently came to the fore once again in a front-page Jerusalem Post editorial (June 7, 2010), which erroneously stated that "the State of Israel was established 62 years ago by order of the international community, as the homeland of the Jewish nation…" (italics added).

The "order," as The Jerusalem Post put it, was presumably a reference to the Partition Resolution. However, as noted earlier, this resolution never in fact "ordered", but only "recommended" the establishment of a Jewish State in a small part of the original Jewish National Home. Contrary to the newspaper's allegation, the State of Israel was established not by the order of the UN General Assembly, but rather by the legislative action taken by the representative and responsible bodies of the Jewish People in 1948, namely, the Jewish Agency for Palestine and the World Zionist Organization. Working together, these chose the members of the People's Council that proclaimed the State of Israel and then transformed itself into the Provisional State Council, the legislative body of the new State. It should be noted that the Council's proclamation adhered to several of the guidelines recommended in the Partition Resolution for the government of the future Jewish State.

It will take a massive effort of re-education to remind both the government leaders of Israel and the world at large that Jewish legal rights to Palestine and the Land of Israel derive not from the 1947 Partition Resolution but from the 1920 San Remo Resolution, the Magna Carta of the Jewish People. The San Remo Resolution is indeed the Charter of Jewish Freedom that had been vainly sought by Theodor Herzl from the Turkish Sultan to carry out his vision of a restored Jewish State in Palestine and the Land of Israel.

Howard Grief is the author of the book The Legal Foundation and Borders of Israel under International Law (Mazo Publishers, Jerusalem).

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